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CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD



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January 17, 2007

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Honorable Mayor and Mr. Fujioka:

This letter is to inform you and your staff of the California Integrated Waste Management Board's (CIWMB) receipt of a permit application package from Browning-Ferris Industries of California (BFI) and the CIWMB's approach to the application. The letter also contains a detailed response to many of the issues described in the October 30, 2007 letter from Beth Jines, Assistant General Manager with the City of Los Angeles Environmental Affairs Department, and the November 15, 2007 letter from Mr. Fujioka. While many of these issues were addressed by the Board at its September 7, 2007 meeting with the County and at the November 20, 2007 meeting with all parties, given the lack of consensus at this late stage we offer the following elaboration.

On January 8, 2008, CIWMB received a solid waste facilities permit application from BFI as the owner and operator of the two Sunshine Canyon landfills located in the City and in the County of Los Angeles, which proposes to change the two present permits for the two separate landfills into one permit for the combined City/County Landfill. This letter advises that the permit application was sent to the CIWMB for processing as there is currently no Solid Waste Local Enforcement Agency (LEA) that



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can fully process a permit application proposing one solid waste facilities permit for a facility spanning two separate jurisdictions, and thus the CIWMB must assume the LEA responsibilities for processing the permit.

As we stated in our October 31, 2007 letter (relating to a prior application submission subsequently withdrawn), Public Resources Code Section 43310 requires that the CIWMB confer with representatives of both the City and the County with respect to the following issues:

“(a) If the board becomes the enforcement agency, on or after January 1, 1995, the local governing body and the board shall enter into an agreement which shall identify the jurisdictional boundaries of the enforcement agency; address the powers and duties to be performed by the board as the enforcement agency, and identify an estimated workload and anticipated costs to the board. The agreement shall also identify the cost recovery procedures to be followed by the board pursuant to Section 43310.”¹

I would appreciate hearing from your offices as to who will be handling the above matter on behalf of the City and the County.

The CIWMB will continue to encourage and assist your staff to take appropriate steps toward the establishment of a new LEA entity that can fully carry out the duties and responsibilities for a landfill that spans both jurisdictions. Until a new LEA is designated and certified, the Board is statutorily required to process and, as appropriate, issue the required permit. The CIWMB has previously indicated that it is willing to establish an agreement with the LEA(s) that would allow the LEA(s) to carry out permit processing duties on behalf of the CIWMB. CIWMB would retain overall control, but the specific permitting tasks could be carried out locally by the LEA(s). When a new LEA entity is designated and certified by CIWMB, the permitting process can be transferred to it. If for some reason a new LEA is not established in time, the CIWMB would need to complete the process and issue the permit. The CIWMB will then need to take on the additional permit enforcement role for the facility. Again, when a new LEA entity is designated and certified, the permit and enforcement responsibilities for the landfill will be fully transferred from the CIWMB.

Relative to the CIWMB perspective on many of the issues raised by Ms. Jines in her October 30, 2007 letter and in the November 15, 2007 letter from Mr. Fujioka, we have the following comments.

¹ We note however, that an agreement need not be executed before the Board is obliged to assume LEA duties. Instead the statute explicitly calls for the Board to seek such an agreement “[i]f the Board becomes the enforcement agency” as required to fill the void, to assure that locally approved landfills are at all times properly regulated under the IWMA.

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Land Use Entitlements

Both letters assert that certain land use conditions (particularly Qualified Conditions of Approval B(d)(1), B(d)(2) and B(d)(2)(aa) [the "Q Conditions"] imposed in connection with the City Council's approval of the rezoning of the City Landfill) require that the City-only Landfill operate at least five years before the portion of the

landfill within the jurisdiction of the City may operate as part of the combined City/County Landfill. Since that five-year period has not yet run, you believe that BFI is not entitled to operate the combined City/County Landfill.

First, let me assure you that it is not CIWMB's intent, nor have we the authority, to interpret and enforce locally-imposed land use conditions. As with all solid waste facilities, the solid waste facility permit is separate and independent from local land use restrictions and entitlements. (See, Public Resources Code §§ 40059(a) – Notwithstanding the Integrated Waste Management Act, cities and counties "may determine...(1) Aspects of solid waste handling which are of local concern, including...[the] nature, location, and extent of providing solid waste handling services." See also, Public Resources Code § 43021 – CIWMB shall develop "standards for the design, operation, maintenance and ultimate reuse of solid waste facilities, but shall not include aspects of solid waste handling or disposal which are solely of local concern.") It is clear that the owner and operator of the Sunshine Canyon landfills must comply with the separate local requirements of the City of Los Angeles and the County of Los Angeles, now and after a new solid waste facilities permit is issued. It is up to the City and County to determine BFI's compliance with local requirements, including whether BFI has the right, under local land use conditions, to operate the combined City/County Landfill upon issuance of a solid waste facilities permit for the Landfill.

The fact that the City and County make their own land use decisions, however, does not mean that an LEA having jurisdiction over the entire facility may not accept an application for, and issue, a solid waste facilities permit for the facility. From the perspective of CIWMB and the LEA, a solid waste facilities permit is wholly independent from local land use entitlements. A solid waste facilities permit is a permit to operate and is but one of a number of permits that an operator must obtain before it commences operation of a solid waste facility. Other typically necessary permits include land use entitlements, waste discharge requirements, and air pollution control district permits. It has long been CIWMB's view that LEAs may not take local land use entitlements into consideration when evaluating permit applications except to the extent they help the LEA better understand the proposed solid waste handling activities and more appropriately condition the solid waste facilities permit. In recent regulations, CIWMB deleted its requirement that operators submit copies of the use permits (if any) with their applications for solid waste facilities permits because some LEAs believed that requirement gave the LEA the authority to determine if the operator had the right, under local planning laws, to operate the proposed facility. That is a

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determination to be made by the local government, not by the LEA. (See Title 27, California Code of Regulations, § 21570(f), effective April 13, 2007.) CIWMB regulations now provide that an applicant must deliver a copy of its solid waste facilities permit application to the local planning department so that the planners can determine whether any further land use entitlements are necessary in the event the LEA issues the solid waste facilities permit. (See 27 CCR § 21570(a).)

It is this latter point – the independence of the solid waste facilities permit from the local land use entitlements – that is at the core of your contentions that BFI may not apply for or receive a solid waste facilities permit because the Q Conditions would prevent the operation of the combined City/County Landfill. We agree that the City and County determine BFI's right to develop and operate the combined City/County Landfill under local land use laws. Whether or not BFI has the land use entitlements to operate the combined City/County Landfill does not preclude the LEA from receiving an application for, and issuing to BFI, a permit to operate the combined City/County Landfill. As with any other permit, however, BFI cannot operate the facility until it has all of the necessary approvals from all public agencies having jurisdiction, including land use entitlements from the City and the County, a solid waste facilities permit and all other permits.

I believe this resolves the land use concerns you raise in your letters.

The Board Act As The Enforcement Agency Of Last Resort

The Board's concerns regarding the lack of an enforcement agency able to process a permit application from the operator date back to the Spring of last year. At that time the operator advised that since it has now obtained a CUP from the County for merged operations, it was now in the process of preparing a solid waste facilities permit application for submission to the appropriate enforcement agency. This led to our June 26, 2007 letter to the City and County, advising that "the board can assume responsibility for processing the permit for the combined facility." The letter further placed the City and County on notice that the "Board would take this action if a joint LEA agreement is not formed by the City and County, or the agreement has not completed the Board's certification process and the facility applies for a combined facility permit."

Over the last half-year the Board has consistently maintained that the Waste Management Act calls for the Board to act as the enforcement agency of last resort where, among other cases, a governing body has failed to designate an

LEA. Specifically, Public Resources Code Section 43202 imposes a mandatory duty upon the Board to assume such a role: "If an enforcement agency is not designated and certified, the board, in addition to its other powers and duties, shall be the enforcement agency within the jurisdiction...."

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While the specific circumstances here are unusual in that the City and County each have LEAs designated and approved within their jurisdictions, there appears to be no dispute that the required designation has yet to be made for the merged landfill, which spans both jurisdictions. Indeed, the draft Memorandum of Understanding between the City and County provided to the Board on December 10, 2007 acknowledges that "no other certified or approved entity currently exists which has the requisite authority under the Act or is otherwise approved to represent or act on behalf of either the City LEA and County LEA, individually or jointly, as a local enforcement agency for permitting the Joint Operation." (p. 2. of Memo)²

While there appears to be no dispute that the required enforcement agency designation has yet to be made by the City and County for the merged landfill, the Board's obligation to fill the "enforcement agency void" for permit application processing has been called into question. The City and County contend that since each have made designations for their respective jurisdictions, the statutory mandate has been fulfilled and thus the Board should not step in as the enforcement agency. Moreover, the City and County contend that the enforcement agency impasse created by the failure to date of the two governing bodies to designate an LEA for the merged landfill can theoretically extend into perpetuity, effectively precluding the landfill from ever merging unless and until the impasse is broken.

The above position of the City and County is contrary to statutory intent. Clearly governing bodies play integral roles in the formation of landfills within their jurisdictions through, among other means, their conditional use permit process.

However, once an operator has gone through all of the hurdles of obtaining local jurisdictional consent for formation, State law assures that there is a mechanism for putting an agency in place to enforce the permit, to assure that any potential void presented by the lack of a local designation does not arise.

Here the issue at hand was not formally raised by the operator until it had obtained the required consent for formation from both the City and subsequently the County in early 2007. Indeed, given the many years the operator has pursued authority from the local jurisdictions to form the merged landfill, it is unfortunate that time was not

² This is further demonstrated by the inability of the jurisdictions to fulfill the designation process set forth in the Regulations without creating a new LEA: (a) When the City and County first designated its respective local agencies, their Notices of Designation included "an enumeration of every solid waste facility ... in the jurisdiction including permitted ... facilities." (14 CCR 18051(h).); (b) Moreover, when the City and County submitted their respective EPPs, their plans included "a comprehensive list of all types of solid waste facilities... within the jurisdiction." (14 CCR 18077(a) (6).); (c) Thus in approving the City's Notice of Designation and EPP, the Board approved its jurisdiction over the City's "Sunshine Canyon" landfill, and in approving the County's Notice of Designation and EPP, the Board approved its jurisdiction over the County's "Sunshine Canyon" landfill (which each have separate SWIS numbers); and (d) With respect to the proposed merged landfill, upon the Boards approval of the new permit the City and County will be required to amend their EPPs to reflect the elimination of the current City and County landfills from their respective EPPs. Finally, the City and County will further be required to submit a new notice of designation and EPP for a new jurisdiction for the merged landfill. (See, e.g., 14 CCR 18081(e)(4): "The components of the EPP shall be reviewed and amended by the LEA...to reflect any changes. The amended components shall be submitted to the board for approval.").

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concurrently utilized to form the new LEA for the bi-jurisdictional landfill. Nevertheless, now that the operator has obtained such local permission, we do not concur that it can be precluded from actually forming the merged landfill solely on the basis that the two jurisdictions are apparently having difficulty coming to terms on the LEA designation process. This "enforcement agency void" is precisely what the Board is obliged to fill unless and until a local designation is made and approved by the Board.

Based on the foregoing, the Board has fulfilled its obligation to step in as the enforcement agency during the brief period the operator had pending a submitted permit application, and stands ready to meet its obligations yet again should the operator reapply before a local LEA is designated and approved. As always, the Board is prepared to enter into an agreement with the City and County in accordance with PRC Section 43310.1 as offered by the Board in its October 31, 2007 letter. We note however, that an agreement need not be executed before the Board is obliged to assume LEA duties. Instead the statute explicitly calls for the Board to seek such an agreement "[i]f the Board becomes the enforcement agency" as required to fill the void, to assure that locally approved landfills are at all times properly regulated under the IWMA.

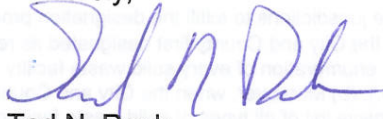
Sole LEA vs. Two LEAs Apportioning Duties Issue

As you are aware, the Board had earlier been concerned over the apparent intent to form the new LEA in a manner which is not consistent with regulatory intent, in that it essentially apportioned the new LEA duties and responsibilities between the existing County and City LEAs, rather than creating a new sole, independent and separate LEA. We are pleased that the Draft MOU now references the formation of a sole, separate, independent LEA, consistent with regulatory intent.

We hope this notice and explanation of our perspective on the issues is of assistance to you. By separate letter to the City and County LEAs we have suggested avenues to maximize your participation in the processing of the combined permit. The CIWMB staff will provide LEA staff with up dates and notices regarding the permit process and will seek their input at every opportunity.

Please contact me at 916-341-6502 or at trauh@ciwmb.ca.gov if you have questions for concerns. Thank you.

Sincerely,



Ted N. Rauh
Program Director
Waste Compliance and Mitigation Program

Cc: LA City LEA
LA County LEA